Birmingham Chapter, National Electrical Contractors Association *and* Local Union 136, International Brotherhood of Electrical Workers. Case 10–CA–19910(E)

February 28, 1994

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On February 1, 1990, Chief Administrative Law Judge Melvin J. Welles issued a decision in the above-entitled proceeding. On July 24, 1990, the National Labor Relations Board remanded this proceeding for further consideration. On October 27, 1993, Chief Administrative Law Judge Melvin J. Welles issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as clarified below and to adopt the recommended Order.

The Applicant, Birmingham Chapter, National Electrical Contractors Association, has excepted to the judge's dismissal of its application for an award of attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA). We agree with the judge that the Applicant was not a prevailing party within the meaning of EAJA, and that the position of the General Counsel in the underlying unfair labor practice proceeding was substantially justified. We accordingly agree with the judge that the Applicant does not qualify for an award under EAJA.

The complaint in the underlying unfair labor practice proceeding alleged that the Applicant violated Section 8(a)(5) and (1) of the Act by failing to provide the Union, upon request, with ''a list of the contractors on whose behalf Respondent held authority to be their bargaining representative.'' The Applicant had not complied with the Union's prior request to provide such a list. The Applicant did comply, however, with the Union's postcomplaint, somewhat differently worded request which stated: ''In order that there is no misunderstanding, this letter is a formal request for you to submit to Local Union 136 a roster showing the names and addresses of all the members of the [Applicant] including those whom you contend are not bound by the . . . negotiations.'' After the Applicant complied with the latter request for information, the Board's Regional Office approved the Union's request to withdraw its unfair labor practice charge and dismissed the complaint.

We have carefully reviewed the Applicant's contention that it was the prevailing party in the underlying proceeding because the unfair labor practice charge was withdrawn and the complaint dismissed. The Applicant contends that the Union's requests for information were fundamentally different, and that therefore its compliance with the second request was not a settlement of the complaint allegations concerning the initial request. Thus, the Applicant contends that it did not comply with the initial information request because it did not in fact know all the employers who had executed letters of assent to permit the Applicant to bargain on their behalf, since such letters were frequently forwarded only to the Union.[1] The Applicant asserts that it was, by contrast, able to comply with the Union's postcomplaint request for a list of the Applicant's membership, including a list of names of those who had revoked bargaining authority, because it possessed that information.

We agree with the judge's rejection of the Applicant's contention that the requests for information were fundamentally different. Although the two requests are not identical, they overlap in their attempt to secure from the Applicant a list of employers the Applicant considered to be bound by any negotiations conducted by the Association. The Union's initial request may have been inartfully drawn in requesting a list of employers that the Applicant did not possess in full. The Union clarified its request, however, to avoid any ''misunderstanding'' and the Applicant thereafter complied with the Union's information request. Thus, although the parties did not enter into a formal settlement of the complaint allegations, the Applicant's compliance with the Union's postcomplaint clarification of its information request rendered moot the subject of the complaint and constituted a de facto settlement of the complaint allegations. This sequence of events, in which the complaint was dismissed after the Applicant's compliance with the clarified information request, cannot support a finding that the Applicant was the prevailing party in the underlying unfair labor practice proceeding.

We further agree with the judge's alternative finding that the position of the General Counsel in the underlying proceeding was substantially justified. In this connection, we note that it is well established that Section 8(a)(5) of the Act obligates an employer to provide a union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967).

The General Counsel here issued a complaint based on the Applicant's undisputed failure to provide information to the Union upon request. The Applicant does not contest the relevance of the information sought. In addition, we find that the Union had a legitimate need to know in essence whether the Applicant's records

[1] The Applicant responded to the initial information request by stating that the Union itself possessed the information sought.

showed any revocations of bargaining authority of which the Union was unaware. Information of this kind must be shared by both parties to the relationship if the process of collective bargaining is to be advanced. Although the Applicant asserts that the initial information request was insufficiently specific to impose a legal duty on the Applicant to provide information, ''[i]t is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information.'' *Keauhou Beach Hotel*, 298 NLRB 702 (1990). While the Applicant's defense to the complaint allegations may or may not have proven successful had the underlying proceeding been fully litigated, we cannot conclude that the Union's initial information request was so deficient as to establish that the position of the General Counsel was without substantial justification. Rather, the issuance of complaint in this case was reasonable both in fact and law based on the Applicant's undisputed failure to comply with the Union's request for relevant and necessary information.[2]

ORDER

The application of the Applicant, Birmingham Chapter, National Electrical Contractors Association, Birmingham, Alabama, for attorney's fees and expenses under the EAJA is dismissed.

[2] The Applicant has excepted to the judge's failure to conduct a hearing in this case. We have reviewed the evidence which the Applicant sought to adduce at a hearing, set forth in the Applicant's reply with supporting affidavit to the General Counsel's answer to the EAJA application. The Applicant asserts, inter alia, that the Board's Resident Officer, after being apprised of the Applicant's contention regarding the insufficiency of the Union's initial request for information, informed the Applicant that the complaint would be dismissed. We find that even assuming the truth of the Applicant's averments, the documentary record supports the judge's findings that the Applicant was not the prevailing party in the underlying proceeding and that the General Counsel's position was substantially justified. We accordingly find that the judge's failure to conduct a hearing, and his unfortunate delay in processing this case, did not prejudice the Applicant's claim for an EAJA award.

SUPPLEMENTAL DECISION AND ORDER

Equal Access to Justice Act

MELVIN J. WELLES, Chief Administrative Law Judge. On February 1, 1990, I issued a Decision and Order in the above-entitled proceeding, denying Respondent's Application for Award of Fees and Other Expenses. Thereafter, pursuant to exceptions filed with the Board, the Board remanded the case to me for further consideration.[1] In my decision, I based certain findings on what I thought at that time was Respondent's failure to reply to the General Counsel's answer to Respondent's application. It is now established that such a reply was in fact sent, and therefore a predicate for my initial holding no longer exists. That is the basis for the remand. I now address the case in the light of all the documents and papers that are presently before me.

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

As set forth in my earlier decision, the charge in this case was filed on January 12, 1984, and on February 29, 1984, the Regional Director issued a complaint alleging that Respondent violated Section 8(a)(5) and (1) of the Act by not furnishing the Union a list of contractors on whose behalf Respondent was authorized to bargain. Thereafter Respondent filed an answer denying the allegations of the complaint.

Correspondence exchanged between the Union and Respondent shows that on at least two occasions before the charge was filed the Union asked Respondent to furnish it with a list of contractors on whose behalf the Association held authority.[2] The Union's first request, on November 30, 1983, said, ''In for the Local Union to know who this letter applies to, please furnish me with a list of the contractors [employers] on whose behalf your Association holds authority.''

Respondent replied, on December 1, that the information as to the employers who were signatory to letters of assent with the Union could be obtained from the union representative, Jimmy Russ. On December 9, the Union wrote again, saying, ''I am also in receipt of your letter dated December 1, 1983, and again I ask that the information previously requested from the Chapter be submitted promptly.'' Applicant responded by saying, ''The answer is every contractor who has signed a Letter of Assent that has not given notice of a revocation of that authority to be their bargaining representative.'' There is no dispute as to the contents of these exchanges.

On March 18, 1984, after the complaint issued, the Union by letter again requested information as follows:

> In order that there is no misunderstanding, this letter is a formal request for you to submit to Local Union 136 a roster showing the names and addresses of all the members of the Birmingham Chapter, NECA, including those whom you contend are not bound by the Inside Agreement negotiations. Please indicate on the roster those wham you contend are not bound by the Inside Agreement negotiations.
>
> All we are seeking is a roster of contractor members. It is very important with respect to our contractual position with the Association. We believe that there may be a violation of our bargaining Agreement and the complete list will assist us in administration of the contract.

[1] The Board's remand order directed me to consider, if necessary, the General Counsel's additional arguments why the Applicant should not receive an award under the Equal Access to Justice Act ''[and to] order any further proceedings necessary to resolve these issues.''

[2] Counsel for the General Counsel attached copies of a statement in support of the charge and correspondence between the parties to the answer to the Application. Any ''findings'' here are based on all the various papers filed by the parties in this case, distilling from them what are clearly uncontested facts. Some conclusions and inferences drawn from these facts are, of course, my own.

On May 22 Respondent replied enclosing ''a list of the names and addresses of the members of the Birmingham Chapter NECA,'' and setting forth the names of those members who had given notice of termination of their authorization to the Chapter to bargain on their behalf. This was the first time that Respondent purported to comply with the Union's request by furnishing a list of names of any kind.

On June 20 the Union requested withdrawal of its charge, and on June 27 the Acting Regional Director approved the request and dismissed the complaint.

II. THE APPLICATION AND ANSWER

Applicant asserts, among other things, that it prevailed in the unfair labor practice proceeding ''totally, and more particularly in that said complaint was dismissed, the notice of hiring withdrawn, and the case closed by order of the Acting Regional Director.'' The General Counsel, in the answer, claims that Applicant did not prevail. The General Counsel also contends that no award shall issue because it was ''substantially justified'' in issuing the complaint.

The General Counsel, in support of its claim that Applicant did not prevail, contends that the unfair labor practice case was resolved by a non-Board adjustment prior to litigation, that if Respondent had prevailed it would not have been required to furnish the Union any of the requested information and that the settlement reflects the typical settlement compromise in which neither side wins or loses, citing *Carthage Heating Co*., 273 NLRB 120 (1984).

Applicant counters this contention by arguing that there was no ''settlement'' at all. It claims that it furnished information to the Union only after the Union's March 18 letter and in response to that, not the earlier requests, and not in settlement of the complaint's allegations. And Applicant asserts that the March 18 request was not the same as the one on which the complaint was based.

The General Counsel first made this argument in the earlier motion to dismiss. I rejected that argument there because at that time it appeared to raise factual issues which could not be resolved on the motion to dismiss and its merits were not reached. In the answer counsel for the General Counsel has attached a statement and documents supplying a factual basis for the argument.

I am now of the opinion that this matter can be decided without any further hearing. Although most of the delay in the handling of this case is fairly attributed to me, the fact remains that at this late date, determination of the principal issues in this EAJA case—whether Applicant is a prevailing party and whether the General Counsel had reasonable grounds for proceeding—have been rendered increasingly difficult by the passage of time itself as Applicant points out in its response to the answer.

EAJA cases generally support the proposition that their resolution without a hearing is preferable. Indeed, Section 201.152 of the Board's Rules and Regulations states, with respect to awards under EAJA: ''Further proceedings—Ordinarily, the determination of an award will be made on the basis of the documents in the record. An evidentiary hearing shall be held only when necessary for resolution of material issues of fact.''

The exchanges of correspondence between Applicant and the Union that took place both before and after issuance of the complaint are not in dispute. For reasons I am about to discuss, I am satisfied that these uncontested facts suffice to resolve this EAJA proceeding.

III. DISCUSSION

''Settle'' is defined as ''To decide [a lawsuit] by mutual agreement of the involved parties without court action.'' And a ''settlement'' as ''An adjustment or other understanding reached in financial matters, business proceedings, or the like.'' American Heritage Dictionary, 1976 Ed., p. 1186. Most settlements, by whatever term they happen to be called, involve each side to a controversy giving up a little bit, perhaps one side more than another, so as to avoid further fuss and bother, expense, or litigation. Indeed, the expense of litigation itself is often a compelling factor in inducing a party to settle, however strong parties' belief in the righteousness of their causes may be.

A careful reading of all the documents filed in this case persuades me that what occurred here was just that—a settlement in every sense of the word. The Union sought certain information, and when it was eventually satisfied that it had what it sought, there was no point in its continuing to litigate so, at its own prompting, it withdrew its charges, and the Regional Director withdrew the complaint. In a typical settlement, there is no admission of guilt, and, except perhaps in a settlement in which the General Counsel participates, no winner or loser. In other words, there is no prevailing party. It would be just as logical, with respect to an out-of-Board settlement for either side to claim that it prevailed. The fact that the complaint was withdrawn obviously cannot by itself establish a respondent as a prevailing party. The circumstances of the withdrawal must be considered. For example, if the General Counsel decided at the trial to capitulate; i.e., that he had no case, then of course, the respondent would be a prevailing party.

Despite the fact that all the outward trappings of an out-of-Board settlement are present here, Applicant, as noted above, claims that it was responding to a brand new and fundamentally different request by the Union. My reading of the precomplaint and postcomplaint requests does not even come close to a conclusion that the two are different at all; rather, they are substantially the same. Obviously, the Union felt so, for it withdrew the charges following the receipt of the information.

Assuming that Applicant was in good faith in its initial response to the Union's request, rather than, as might appear, playing games with the Union, that would not militate against the conclusion that it did not ''prevail.'' Even a formal settlement, with a nonadmission clause, does not require a respondent to abandon its conviction that it never committed an unfair labor practice.

A case very much in point is *Dame & Sons Construction Co*., 292 NLRB 1044 (1989). There a complaint had issued alleging a host of unfair labor practices, including an unlawful layoff of employee Andrews. The Regional Director subsequently withdrew the complaint based on the parties' agreement to submit the dispute to the grievance-arbitration procedure. Thereafter, the respondent and the union involved entered into a ''non-Board agreement.'' Pursuant to that agreement, the respondent paid Andrews $800, and the union withdrew all unfair labor practice charges, and abrogated reinstatement claims as well as claims to a collective-bargain-

ing relationship with the Applicant and any claims concerning the preceding events.

In the above circumstances, the Board dismissed Applicant's claim for an EAJA award. The Board stated at 1045:

> We cannot find that the May 24 non-Board settlement agreement was favorable to the Applicant. We cannot know what the parties sought and their relative strengths and weaknesses when they finally sat down to negotiate and resolve this dispute. The agreement represents a compromise in which there is something for everyone. The charges were withdrawn as an element of a compromise, not as a unilateral release of the Applicant from all obligations claimed in the complaint. The Applicant incurred financial responsibilities that it would not have had if the complaint had been dismissed. Furthermore the settlement precludes finding that either the Government or the Applicant won or lost. Rather, ''neither won nor lost, but clearly a prime purpose of the Act, the promotion of collective bargaining, was well served.'' [Citing *Carthage Heating*, supra]. Accordingly the Applicant is not a prevailing party within the meaning of the EAJA.

The discussion of prevailing party, and conclusion that respondent is not one, even if erroneous, would not establish applicants' right to an EAJA award. If, for example, the General Counsel was substantially justified in issuing the complaint and continuing to prosecute the case up to the time of the withdrawal, Applicant would not be entitled to any award.

It might well be that had the underlying unfair labor practice proceeding been fully litigated and decided, Applicant would have prevailed, perhaps on the very ground urged here—that the Union's precomplaint request for information was ambiguous, or sufficiently so as to absolve Applicant of any unfair labor practice liability for not providing the Union with any information. The converse could also be true—that an 8(a)(5) violation would have been found.

On its face, the initial request (for ''a list of the contractors on whose behalf your association holds authority'') sought information plainly relevant to the collective-bargaining process. Applicant does not contend otherwise. Nor did its response to the first request (''get it from the Union representative'') or to the second request (''the answer is every contractor who has signed a Letter of Assent that has not given notice of a revocation of that authority . . .''). The second response does not even suggest that Applicant did not possess the information.

It would have been very easy for the Association to provide the names of ''every contractor,'' as it eventually did after the postcomplaint ''clarification'' by the Union, when it furnished ''a list of the names and addresses of the members of the Birmingham Chapter NECA,'' and set forth the names of those members who had notified the Association of termination of their authorization. As noted above, Applicant does not assert that the various exchanges of correspondence between Respondent and the Union that are attached to the moving papers and responses are in any way not genuine. Holding a hearing for the purpose of ascertaining whether the General Counsel did have a reasonable basis for continuing to prosecute the case up to the time of the withdrawal would be highly unlikely to reveal any more than can now be gleaned from the plenitude of papers filed herein.

Based on the record before me, I am satisfied that the General Counsel did have a substantial basis for issuing the complaint. That being so, there was, of course, no reason for the General Counsel to dismiss the complaint until the Union withdrew the charge.

For all the foregoing reasons, I am satisfied that the instant claim for attorney's fees under EAJA should be denied, and that no hearing is required herein. My primary ground for so concluding is my finding that Applicant is not a prevailing party. The finding that the General Counsel had a substantial basis for issuing the complaint is an alternative ground for denying the application.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The application of Birmingham Chapter, National Electrical Contractors Association for attorneys' fees and expenses under the Equal Access to Justice Act is dismissed.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.